Supreme Court, U.S.
FILED

98 681 OCT 21 1998

OFFICE OF THE CLERK

No. 98-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

VERNA MONKS, a/k/a
VERNA STAFFORD,

Petitioner,

-v.-

NEVILLE MASSIE, Warden
of the Mabel Bassett
Correctional Center,

Respondent.

On Petition For A Writ of Certiorari to
The Tenth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Lanita Henricksen
(Counsel of Record)
Henricksen & Henricksen
Lawyers, Inc.
210 North Choctaw
P.O. Box 1129
El Reno, Oklahoma 73036
(405) 262-0983

QUESTIONS PRESENTED

1. Whether the Petitioner should have been granted a Certificate of Appealability.

2. Whether the lower court erred in denying the Petitioner habeas corpus relief due to her increased punishment at her resentencing hearing due to vindictiveness on the part of the resentencing judge.

PARTIES TO THE PROCEEDING BELOW

The caption of the case includes the names of all parties.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT..... 5

1. IT WAS ERROR TO DENY THE PETITIONER A WRIT OF HABEAS CORPUS DUE TO HER ILLEGAL CONFINEMENT IN STATE PRISON DUE TO FEDERAL CONSTITUTIONAL ERROR.....5

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

Alabama v. Smith,
490 U.S. 794 (1989).....12

Chaffin v. Stynchcombe,
412 U.S. 17, 93 S.Ct. 1977,
36 L.Ed.2d 714 (1973).....9

Garafola v. Benson,
505 F.2d 1212 (7th Cir. 1974)..... 6

Green v. United States,
355 U.S. 184, 78 S.Ct. 221,
2 L.Ed.2d 199 (1957).....12

Griffin v. Illinois,
341 U.S. 12, 76 S.Ct. 585 (1958).....10

North Carolina v. Pearce,
395 U.S. 711, 89 S.Ct. 2072,
23 L.Ed.2d 656 (1969).....8

Constitution

Fourteenth Amendment.....2

Federal Statute

28 U.S.C. Sec. 1254.....2
28 U.S.C. Sec. 2254.....passim

State Statutes

57 Okla. Stat. tit. 353.....4

OPINIONS BELOW

The decision of the Tenth Circuit Court of Appeals is not reported, and is reprinted in the appendix. (App. 1-3).

Other Relevant Opinions and Orders

The Order of the United States District Court For The Western District of Oklahoma denying the Petitioner's Petition For Habeas Corpus Relief is not a reported case, and is reprinted in the appendix. (App. 27-29). This Order is an order affirming the Report and Recommendation of the Magistrate Judge recommending denial of the Petition For A Writ Of Habeas Corpus.

The Report and Recommendation of the United States Magistrate Judge recommending denial of the Petition For A Writ of Habeas Corpus is reprinted in the Appendix. (App. 4-21).

The Post Convicting Findings of the District Court of Oklahoma County, State of Oklahoma, granting the Petitioner's Application For Post Conviction Relief due to her void indeterminate sentence is reprinted in the Appendix. (App. 22-23).

JURISDICTION

The Order and Judgment of the Tenth Circuit Court of Appeals was issued on July 23, 1998. (App. 1-3). The decision affirmed the Order of the United States District Court For the Western District of Oklahoma's Order and Judgment of October 29, 1997, denying the Petitioner's Petition For A Writ of Habeas Corpus and upholding the Petitioner's increased sentence received at the Petitioner's resentencing hearing in the Oklahoma County District Court for the State of Oklahoma.. The Petition For A Writ of Habeas Corpus was filed in the federal district court under 28 U.S.C. Sec. 2254.

No rehearing was requested.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the law of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its

jurisdiction the equal protection of the laws.

Section 2254 of 28 U.S.C. states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Factual Background

On March 11, 1980, subsequent to plea bargaining, the Petitioner pled guilty to two counts of second degree murder in the District Court of Oklahoma County, case numbers CRF-80-1153 and CRF-80-1154, before the Honorable Charles Owens, District Judge. The plea agreement was ten years to life on each count, to run

concurrent. That indeterminate sentence of ten years to life was the sentence imposed. Judge Owens ordered

punishment under 57 Okla. Stat. Sec. 353 which provided for indeterminate sentences. Subsequently, 57 Okla. Stat. Sec. 353 was found to be inapplicable where a life sentence is the maximum.

The Petitioner subsequently filed an Application For Post-Conviction Relief, in the District Court of Oklahoma County, State of Oklahoma, requesting that her sentences be modified to a sentence of ten (10) years. The State of Oklahoma filed a response to the Petitioner's application, acknowledging the possibility that the Petitioner's sentence might be illegal. The State requested that the Honorable Richard Freeman conduct a resentencing hearing if the application was sustained.

The application was sustained, however, Judge Freeman ordered the Petitioner to undergo resentencing, rather than granting her request for a sentence reduction. The court held a resentencing hearing on the 7th and 8th days of August, 1989. At the conclusion of the evidence, Judge Freeman imposed two life sentences, to run consecutively.

Proceedings.

The Petitioner filed for post-conviction relief The increased sentences were upheld in Stafford v. State, 800 P.2d 738 (Okla. Cr. 1990).

The Petitioner, in her sole appearance in federal court for any purpose, filed a Petition For A Writ of Habeas

Corpus under 28 U.S.C. Sec. 2254 in the United States District Court For the Western District of Oklahoma. On October 7, 1997, United States Magistrate Judge Gary M. Purcell entered a Report and Recommendation which recommended that the Petition For A Writ of Habeas Corpus be denied. On October 29, 1997, the district court entered an Order and Judgment denying the Petition For A Writ of Habeas Corpus, and denying a certificate of appealability. (App. 27-29). The court found that no presumption of vindictiveness arose from her increased sentences and (2) no actual vindictiveness had been shown by the Petitioner. (App. 27-29).

The Petitioner timely filed an appeal in the Tenth Circuit Court of Appeals. On July 23, 1998, the Tenth Circuit Court of Appeals entered an Order and Judgment denying the certificate of appealability and dismissed the appeal. (App. 1-3).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for the reason that the Petitioner's increased sentences at her resentencing hearing was a violation of her right to due process.

I. IT WAS ERROR TO DENY THE PETITIONER A WRIT OF HABEAS CORPUS DUE TO HER ILLEGAL CONFINEMENT IN STATE PRISON DUE TO FEDERAL CONSTITUTIONAL ERROR.

The Petitioner is confined in the state penitentiary due to the imposition of increased sentences at rehearing, which harsher sentences were imposed as a result of vindictiveness on the part of the resentencing judge. The increase in the sentences constitutes a violation of due process, entitling her to relief under 28 U.S.C. Sec. 2254, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings **unless** the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

The writ of habeas corpus should have been granted to the Petitioner, as the decision of the state court was contrary to and involved an unreasonable application of clearly established federal law as determined by this Court in the following cases.

The Petitioner has been penalized for exercising her right to apply for relief due to the original invalid indeterminate concurrent sentences of ten years to life on the

two counts of second degree murder. She initially received indeterminate sentences, the purpose of which is rehabilitative in nature, as set out in Garafola v. Benson, 505 F.2d 1212, 1217 (7th Cir. 1974) in the following language:

> A major purpose of any indeterminate sentence provision is to give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community. By keeping the minimum low, the prisoner is encouraged "to earn favorable consideration for parole in accord with the public policy embodied in the parole statutes". (Emphasis added).

In keeping with the underlying purpose of indeterminate sentencing, at the Petitioner's first sentencing by The Honorable Charles Owens, the judge stated to her that:

> I sentence you in each case to an indeterminate sentence of not less than ten years, nor more than life. . . An indeterminate sentence means just that of course. It means that you are sentenced to that term of imprisonment. And the time you actually spend in the penitentiary depends to a great extent on you, your conduct . . . That's not for the Court. That's a matter addressed within the executive branch of government. But that's what it means.

The Petitioner was a model prisoner, attempting to

rehabilitate herself during her confinement. She attended every rehabilitative activity available, earned two associate degrees, worked while in prison, entered a religion, and helped other inmates, as was indicated by certificates and records attached to her Petition For A Writ of Habeas Corpus.

The resentencing judge's imposition of life sentences, rather than a reasonable number of years, and additionally imposing the life sentences to run consecutively was punitive in nature for seeking relief which she was entitled to seek.

The resentencing judge's refusal to modify the Petitioner's sentences is in opposition to what the courts had done for other prisoners imprisoned indeterminately on murder convictions. Other prisoners had received reduced sentences in response to their requests for modification of their indeterminate sentences. Instead of modifying the Petitioner's illegal sentence as had been for others, such as modification to the minimum sentence originally imposed, or reduced to time already served, the Petitioner's sentence was increased, as a penalty for requesting that her illegal sentence be corrected.

This Court has held that the imposition of increased punishment upon resentencing is unconstitutional. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) set out the general rule that due process forbids judicial vindictiveness from entering into resentencing which results in a more severe sentence than originally given. This Court stated that it is patently unconstitutional to increase the sentence for exercising the defendant's right to attempt to get his original conviction set aside because of constitutional error. 395 U.S. at 724. This Court stated that "due process

also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge". Id. at 725. This Court further held that:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. (Emphasis added)

Id. at 726. As discussed below, the resentencing judge gave no reason for increased sentences based on the Petitioner's conduct occurring **after** the time of the original sentencing proceeding. In fact, in the transcript of the resentencing, the judge referred to the original sentence and stated:

> "You know, it's not our place here today to try to second guess Andy Coats[1] or Judge Owens on things that they did many years ago."

---

[1] Andy Coats was the District Attorney in Petitioner's criminal cases.

Subsequent to Pearce, the Court in Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) reiterated that:

> Under our constitutional system it would be impermissible for the sentencing authority to mete out higher sentences on retrial as punishment for those who successfully exercised their right to appeal, or to attack collaterally their conviction".

93 S.Ct. At 1981. This Court, at footnote 11 further explained that:

> While there is no per se constitutional right to appeal, this Court has frequently held that once a State establishes an appellate forum it must assure access to it upon terms and conditions equally applicable and available to all".

Id. That was further explained in Griffin v. Ilinois, 34 L U.S. 12, 76 S.Ct. 585 (1958) wherein this Court explained:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unseasoned distinctions that can only impede open and equal access to the courts.

It is undeniable that the State of Oklahoma provides for direct appeal and post-conviction relief. The Petitioner in

Chaffin was denied federal habeas relief. However, it is important to distinguish between that case and this case in that "[t]he parties agree that the jury was not aware of the length of the sentence meted out by the former jury". Id. at 1979. Petitioner's resentencing judge was aware that she had received a lighter sentence at the first sentencing.

The resentencing judge's vindictiveness is evidenced by the statements made to the Petitioner, including:

> "I suppose there is no end to the lessons that one might learn from this particular set of circumstances from Ms. Stafford's point of view. One thing, unfortunately that we learn, we all have to learn it sooner or later, and maybe this is later for her, but **you shouldn't ask for something, lest it might be granted to you. She's asked for a resentencing, and that's what she is here for."**

(Rehrg. Tr. 296; App. 25). Additionally, the judge remarked:

> "And when you ask for something that you don't want or that you don't expect, it may come as a shock to you, but you've asked for a resentencing, and I've got to do it."

(Rehrg. Tr. 300; App.26). Further, the judge stated:

> **"[B]ut I would wager that there is one of the hottest corners of Hell, vacant, that has your name right above it and they are waiting for you."**

Id. The judge further added:

> "Everyone knows, everyone in the business these days knows a life sentence is considered 45 years. You are considered for parole at 45 years on a life sentence. If I gave you a thousand years, you'd be considered for parole at 45, so it doesn't really matter. The length of time that I give you I don't think makes any difference.
>
> I will give you the maximum that this particular crime carries and that is life. I will give that to you on both counts and I will certainly run them consecutively, certainly consecutively".

Id.

The Petitioner has shown that the increased sentences were imposed to to presumed as well as actual vindictiveness, even though she is only required to show presumed vindictiveness. In the Magistrate Judge's Report and Recommendation, the case of Alabama v. Smith, 490 U.S. 794 (1989) was cited. However, as stated in the Report, in Alabama the Supreme Court concluded that there is no presumption of vindictiveness if the increased sentence follows a trial when the original sentence was imposed pursuant to a guilty plea. Id at 803. In circumstances in which vindictiveness by the sentencing judge cannot be presumed, the Court in Alabama found that the defendant has the burden to demonstrate that the resentence was the result of actual vindictiveness. Id at 799-800. There was no trial involved in the Petitioner's case.

In Green v. United States, 355 U.S. 184, 78 S.Ct. 221,

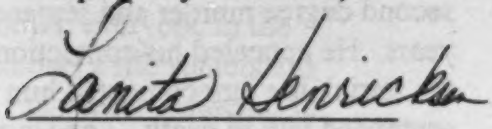
2 L.Ed.2d 199 (1957) the defendant was charged with arson and first degree murder. The jury found him guilty of second degree murder and sentenced him to five to twenty years. He appealed his conviction of second degree murder. On retrial, the jury convicted him of first degree murder and sentenced him to death. The United States Supreme Court held as follows:

> When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. . . . Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States. (Emphasis added).

CONCLUSION

The Petitioner was entitled to a certificate of appealability and federal habeas corpus relief modifying her sentences to time served, concurrent, or alternatively to a sentence less than consecutive sentences.
The Petition for a writ of certiorari should be granted and this case should be set for a full hearing by the Court. In the alternative, certiorari should be granted and the decision below summarily reversed, sending the case back for further proceedings.

Respectfully submitted,



Lanita Henricksen
(Counsel of record)
Henricksen & Henricksen
Lawyers, Inc.
210 North Choctaw
P.O. Box 1129
El Reno, Oklahoma 73036
(405) 262-0983

Dated: October 20, 1998

Supreme Court, U.S.
FILED

98 681 OCT 21 1998

OFFICE OF THE CLERK

No. 98-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

VERNA MONKS, a/k/a
VERNA STAFFORD,

Petitioner,

-v.-

NEVILLE MASSIE, Warden
of the Mabel Bassett
Correctional Center,

Respondent.

On Petition For A Writ of Certiorari to
The Tenth Circuit Court of Appeals

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

Lanita Henricksen
(Counsel of Record)
Henricksen & Henricksen
Lawyers, Inc.
210 North Choctaw
P.O. Box 1129
El Reno, Oklahoma 73036
(405) 262-0983

30 pp

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VERNA MONKS, a/k/a Verna Stafford,	)
	)
Petitioner-Appellant,	)
	)
vs.	) No. 97-6417
	) (D.C. No. CIV-97-645-A)
NEVILLE MASSIE,	) (W.D. Okla.)
	)
Respondent-Appellee.	)

ORDER AND JUDGMENT*

Before **Baldock, Ebel** and **Murphy**, Circuit Judges.

Appellant, Verna Monks, appeals the district court's denial of her petition for a writ of habeas corpus filed

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citations of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cr. R. 36.3.

pursuant to 28 U.S.C. Sec. 2254. [1] Before proceeding on appeal, Monks must obtain a certificate of appealability

---

[1] After examining appellant's brief and the appellate record, this panel has determined unanimously to grant appellant's request for a decision on the brief without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9 The Case is therefore ordered submitted without oral argument.

from this court, which requires "a substantial showing of the denial of a constitutional right." 28 U.S.C. Sec. 2253(c)(2).

Monks pled guilty to two counts of second degree murder and was given two concurrent indeterminate sentences of ten years' to life imprisonment. After successfully challenging the validity of those sentences, Monks was resentenced by a different judge, who imposed two consecutive life sentences based upon evidence developed at the second sentencing hearing of the grievous and outrageous nature of the crimes for which she was convicted and other criminal conduct. Monks challenges the harsher sentences on the ground of judicial vindictiveness. A presumption of vindictiveness will not arise when, as here, "a different judge imposes the second sentence and provides an one-the-record, wholly logical, nonvindictive reason for the sentence." Macomber v. Hannigan, 15 F.3d 155, 156 (10th Cir. 1994) (quotation omitted). Absent a presumption of vindictiveness, Monks bears the burden of demonstrating actual vindictiveness, see id. at 157, which she has failed to do.

Therefore, Monks' application for a certificate of appealability is DENIED and the appeal is DISMISSED.

Entered for the Court

David M. Ebel
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

VERNA MONKS, a/k/a VERNA STAFFORD,	)	
Petitioner,	)	CV-97-645-A
vs.	)	
NEVILLE MASSIE,	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, brings this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. Sec. 22254. Petitioner asserts that her constitutional rights were violated when she was resentenced on August 7 and 8, 1989, following her guilty pleas entered March 11, 1980, to two counts of Murder in the eh Second Degree in the eh District Court of Oklahoma County, Case Nos. CRF-80-1153 and CRF-80-1154. Respondent has responded to the Petition, and Petitioner has replied to the Response. Respondent has also filed the state court transcripts of the resentencing proceeding (hereinafter TR___). The matter has been referred to the undersigned Magistrate Judge for initial proceedings in accordance with 28 U.S.C. Sec. 636(b)(1)(B). Inasmuch

as the matter may be resolved on the basis of the record and the law, and because Petitioner has not shown a justifiable failure to develop the factual bases of her claims in state court, an evidentiary hearing is not necessary. 28 U.S.C. Sec. 2254(e)(2) (1996); Townsend v. Sain, 372 U.S. 293, 312 (1963). For the following reasons, it is recommended that the Petition be denied.

Petitioner was originally sentenced by Oklahoma County District Judge Charles L. Owens pursuant to a plea agreement to two concurrent indeterminate sentences of not less than ten years nor more than life imprisonment. Amended Petition, Exs. A, B. Petitioner did not appeal the convictions. In her application for post-conviction relief filed in the trial court on May 9, 1989, Petitioner alleged she was improperly sentenced because the indeterminate sentencing statute had been repealed in 1976. Amended Petition, E. C. Oklahoma County District Judge Richard W. Freeman granted Petitioner's application, finding that her original sentences were invalid, and set the matter for resentencing. Amended Petition, Ex. E. [1] Both Petitioner

---

[1]The indeterminate sentencing statute under which petitioner was convicted, Okla. Stat. Tit. 21, Sec. 701.4 had been repealed in 1976. Okla. Stat. Tit. 21, Sec. 701.9, enacted in 1976, provided for an indeterminate sentence of ten years to life imprisonment for a conviction of Murder in the Second Degree. However, a general indeterminate sentencing provision applicable to Petitioner's sentence, Okla. Stat. tit. 57 Sec. 353, provided that when an

and the prosecution presented evidence and arguments during the resentencing proceeding, following which Judge Freeman resentenced Petitioner to two consecutive life sentences.

Petitioner filed a second application for post-conviction relief in the trial court, asserting that the resentencing violated due process, equal protection and double jeopardy guarantees as well as state law. Amended Petition, Ex. F. The application was denied, and the denial was affirmed on appeal in Stafford v. State, 800 P.2d 738 (Okla. Crim. App. 1990). Amended Petition, Ex. G.

Petitioner now asserts the same claims before this court that were raised in her second state post-conviction proceeding. In response, Respondent first contends that the limitation period governing this habeas action codified at 28 U.S. C. Sec, 2244(d)(1) has expired and review of the Petition is therefore not available Respondent surprisingly urges this position while at the same time recognizing that the Tenth Circuit Court of Appeals has extended the limitation period in Sec. 2244(d)(1) until April 23, 1997, for prisoners whose federal habeas petitions would have

---

indeterminate sentence is imposed, "[t]he minimum term may be less than, but shall not be more than, one-third (1/3) of the maximum sentence imposed by the court. . . ." The Oklahoma Court of Criminal Appeals concluded in 1989 than an indeterminate sentence of five years to life imprisonment violated Sec. 353 and ruled that "the trial court may not set an indeterminate sentence where a life sentence is the maximum imposed." White v. State, 774 P.2d 1072 (Okla. Crim. App. 1989)

been foreclosed under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, effective April 24, 1996, prior to the date the habeas amendments contained in the AEDPA became effective. The instant Petition, filed on April 23, 1997, clearly falls within the one-year grace period adopted in United States v. Simmonds, 111 F.3d 737, 745-746 (10th Cir. 1997), for t

for the parallel statute of limitations found in 28 U.S.C. Sec. 2255. Accordingly, the undersigned finds that the Petition is timely filed within one year of April 24, 1996.

The amendments to the federal habeas procedure enacted in the AEDPA provide that habeas relief may be granted only when the state court's adjudication of the merits of a claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. Sec. 2254(d)(1) - (2) (1996). Further, the State court's factual determinations are presumed to be correct, and this presumption of correctness can be overcome only by clear and convincing evidence. 28 U.S.C. Sec,

2254(e)(1) (1996). [3]

Petitioner does not question the authority of the trial court to resentence her. However, Petitioner contends that because she was resentenced to a term of imprisonment in excess of her original sentence, she was denied her constitutionally-protected liberty interest in the expectation of consideration for parole after ten years of imprisonment. Petitioner also alleges the resentencing to a longer term of imprisonment resulted from judicial vindictiveness in violation of her right to due process and subjected her to double jeopardy in violation of the Fifth Amendment.

---

3. Application of this standard depends upon whether the issue is one of law or fact, or a mixture of both law and fact. A determination concerning a question of law warrants habeas relief only if it is contrary to clearly established Federal law as determined by the Supreme Court. Habeas relief is available concerning pure questions of fact if the state court's determination of the facts was unreasonable in light of the evidence presented in the State court. Williamson v. Ward, 110 F.3d 1508, 1521 n. 14 (10th Cir. 1997). The standard for reviewing mixed questions of law and fact would appear to require a combination of the previous two standards. Hence, if "the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts[,] . . . Sec. 22254(d)(1) restricts the grant of relief to cases in which the State's decision reflects an 'unreasonable application of the law." Lindh v. Murphy, 96 F.3d 856, 870 (7th Cir. 196), rev'd on other grounds, 117 S.Ct. 1059 (1997).

Finally, Petitioner alleges that the resentencing violated her right to equal protection where the invalid indeterminate sentences of other similarly situated state prisoners were reduced rather than increased.

It is clearly established Federal law that "[t]here is no constitutional or inherent right of a criminal person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979). Neither do Oklahoma's parole statutes create a liberty interest in parole. Shirley v. Chestnut, 603 F.2d 805, 807 (10th Cir. 1979). Se Phillips v. Williams, 608 P.2d 1131, 1134–1135 (Okla.), cert. Denied sub nom. Shabazz v. Williams, 449 U.S. 860 (1980) (reaching the same conclusion). Petitioner's mere expectation of parole consideration under her original sentences does not create a liberty interest protected by the Due Process Clause.

Petitioner's due process claim is also grounded in North Carolina v. Pearcek, 395 U.S. 711 (1969), in which the Supreme Court concluded that the Due Process Clause of the Fourteenth Amendment prevents imposition of an increased sentence after reconviction following a new trial when that increase is motivated by the vindictiveness of the trial judge. Id at 725-726. However, contrary to Petitioner's suggestion, the Supreme court did not create a per se rule in Pearce. Pearce established a "presumption of vindictiveness" which the Court found in Texas v. McCullough, 475 U.S. 134 (1986), was not present when a

different judge imposed the second sentence and provided an "on-the-record, wholly logical, nonvindictive reason for the sentence." Id. at 140. As the Court stated in McCullough, "vindictiveness of a sentencing judge is the evil the court sought to prevent rather than simply enlarged sentences after a new trial." Id. at 138. Thus, the presumption of vindictiveness established in Pearce arises only in those circumstances where "there is a 'reasonable likelihood' . . . that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." Alabama v. Smith, 490 U.S. 794 (1989). In Alabama, the Supreme Court further narrowed the scope of Pearce by concluding there is no presumption of vindictiveness if the increased sentence follows a trial when the original sentence was imposed pursuant to guilty plea. Id. at 803. In circumstances in which vindictiveness by the sentencing judge cannot be presumed, the Court in Alabama found that the defendant has the burden to demonstrate that the resentence was the result of actual vindictiveness. Id. at 799-800.

In Macomber v. Hannigan, 15 F.3d 155 (10th Cir. 1994), the Tenth Circuit explained the prevailing standard after McCullough:

> "when a different judge imposes a more severe sentence than the sentence imposed in the initial trial and the judge provides an 'on-the-record, wholly logical, nonvindictive reason for the [harsher] sentence,' the Pearce presumption of vindictiveness does not apply. Moreover, it is not necessary that the second sentencing judge rely on and provide facts not available at the time of the

> first sentence to support the more severe sentence. Absent the presumption of vindictiveness, the burden is on Mr. Macomber to prove actual vindictiveness.

Id. at 157 (citation and footnote omitted).

In reviewing Petitioner's second post-conviction appeal, the Oklahoma Court of Criminal Appeals found that "following the district court's determination that the original sentences were invalid, petitioner was given the opportunity to withdraw her previous pleas and specifically declined to do so. Thereupon, the court conducted a hearing and resentenced petitioner pursuant to 22 O.S. 1981, Sec. 1085. The two (2) terms of imprisonment meted out were within the range of punishment authorized by 21 O.S. Supp. 1976, Sec. 701.9, the section under which petitioner should have originally been sentenced." Stafford v. State, 800 P.2d at 739-740. Considering these presumptively correct factual findings, no presumption of vindictiveness arose when Petitioner was resentenced to an increased sentence. The second sentencing was a de novo proceeding whereas the first sentencing was the result of a plea agreement. Therefore, the resentencing was based on a different set of circumstances in which a different trial judge exercised independent sentencing discretion based on the evidence presented at the resentencing proceeding. As Judge Freeman explained on the record in imposing the consecutive life sentences, he considered the evidence showing that the killings in which Petitioner participated were part of "the worst crime spree in the history of the state" resulting in nine deaths, that the killings were done solely for money, and that strong public sentiment expressed in letters and petitions he received showed "the

depth of the feeling: concerning the "terrible" nature of the murders. (TR 297-299). The judge also cited the traditional reasons for imposing a lengthy term of incarceration, including deterrence, separation, rehabilitation, retribution, and parity. (TR 296-297) Pointing out that this was "the awfulest crime I've ever heard of," the judge stated Petitioner had "forfeited" her "right to live in our society." (TR. 300). No vindictiveness can be presumed in light of this record demonstrating the trial judge's logical, non-vindictive explanation for the sentences imposed upon Petitioner at her resentencing.

In an effort to satisfy her burden of demonstrating actual vindictiveness, Petitioner refers to a remark made by the trial judge in resentencing Petitioner, in which the judge paraphrased an old adage, stating "you shouldn't ask for something, lest it might be granted to you. She's asked for a resentencing, and that's what she's here for." (TR 296). Later, the trial judge reiterated the same maxim: "And when you ask for something that you don't want or that you don't expect, it may come as a shock to you, but you've asked for a resentencing and I've got to do it." (TR 300).

These remarks do not show actual vindictiveness, as suggested by petitioner. The trial judge was merely emphasizing the risk Petitioner took in seeking post-conviction relief from her sentence. There is certainly no vindictiveness reflected in the trial judge's careful evaluation of the evidence relevant to sentencing, and his remarks indicate nothing more than a sympathetic recognition of the Petitioner's situation. Once the plea-bargained sentences were vacated and Petitioner chose to

reaffirm her previous guilty pleas, the trial judge could consider any relevant sentencing information that could have been presented in the first sentencing proceeding. See United States v. Atehortva, 69 F.3d 679, 685 (2nd Cir. 1995) (when resentencing occurs as result of misapplication of sentencing guidelines, district court was free to consider grounds for departure not contemplated at first hearing and if more severe sentence results, vindictiveness is not presumed.).

No actual vindictiveness has been demonstrated by petitioner, and the state court's determination as to Petitioner's claim of a due process violation stemming from her resentencing is not contrary to clearly established Supreme Court jurisprudence.

Likewise, the state court's determination that the resentencing of Petitioner did not violate double jeopardy guarantees is not contrary to clearly established Federal law. "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . ." Green v. United States, 355 U.S. 184, 187 (1957). The protection afforded defendants against double jeopardy "has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. at 717 (footnotes omitted).

However, the double jeopardy guarantee does not generally extend to a defendant who has been convicted

after a first trial. In that situation, the Double Jeopardy Clause "imposes no limitations whatever upon the power to retry d defendant who has succeeded in getting his first conviction set aside." Id. at 720. An exception to this rule exists when a conviction has been reversed because of insufficient evidence. Burks v. United States, 437 U.S. 1, 16 (1978). Regarding the imposition of punishment upon a convicted defendant, the Supreme Court has clearly established that a defendant has no legitimate expectation of finality in the original sentences imposed by the trial court. United States v. DiFrancesco, 449 U.S. 117, 136 (1980) ("The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be."). Hence, where a sentence is subject to appeal, an increase in punishment is not prohibited by the Double Jeopardy Clause where the appellate court finds the trial court abused its discretion, employed unlawful procedures, or made clearly erroneous findings. Id, at 141 (upholding Federal statute giving appellate courts authority to increase the sentence of a dangerous special offender).

Petitioner's original sentences were vacated on appeal because the sentences were invalid under state law. No double jeopardy violation occurred when the trial court then resentenced Petitioner to an increased term of imprisonment. Under these circumstances, "there is no threat of either multiple punishment or successive prosecutions, [and] the Double Jeopardy Clause is not offended." United States v. Wilson, 420 U.S. 332, 352-353 (1975).

Petitioner's third alternative ground for habeas relief related to her resentencing is an equal protection

claim. Petitioner contends that after the decision in White, see supra n. 1, the Oklahoma Court of Criminal Appeals reduced the sentences of several prisoners who had received invalid indeterminate sentences under the same statute employed in her original sentencing. Because her sentences were not reduced in like manner, Petitioner contends her right to equal protection was violated. The Constitution's equal protection guarantee "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Petitioner contends she was similarly situated to those prisoners whose "indeterminate sentences were reduced to ten years, to time served, or to greatly reduced sentences than originally imposed." Amended Petition, at 17.

The Oklahoma Court of Criminal Appeals refused to grant relief concerning Petitioner's equal protection claim, finding that its

> "decision in White, supra, clearly states that the procedure this Court will follow in correcting an invalid sentence is to remand the cause to the district court with instructions to vacate the judgement and sentence and determine disposition in compliance with 22 o.s. 1981, Sec. 1085. Assuming arguendo that the unpublished orders cited by petitioner constituted precedential authority, we would find that the procedural enunciated in the White opinion, which post-dates the cited orders, represents the current position of this Court. Because the district court in the present case

> followed the mandates of White, we deem petitioner's equal protection argument meritless."

Stafford v. State, 800 P.2d at 741.

Petitioner is not contending that her sentences are disproportionate to the offenses. InHarmelin v. Michigan, 501 U.S. 957 (1991), Justice kennedy, in a concurring opinion, greatly narrowed the proportionality element previously recognized in Solem v. Helm, 463 U.S. 277 (1983), as being necessary to an Eight Amendment analysis of any sentence. Justice Kennedy stated that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Harmelin, 501 U.S. at 1001 (Kennedy J., concurring). Petitioner's sentences are hardly disproportionate under the Eighth Amendment to the horrific offenses for which she was convicted. See Stafford, 800 P.2d at 739 (description of the offenses). Her attempt to invoke the Equal Protection clause to open a new door of collateral attack grounded in the eh same Eighth Amendment proportionality standard but having no relationship to the offense at issue is without merit.

"[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categories on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally furthers a legitimate state interest." Norlinger v. Hahn, 505 U.S. 1, 10 (1992). Petitioner is claiming that the procedure employed by the Oklahoma Court of Criminal

Appeals in which her post-conviction application was remanded to the district court for resentencing was different than the procedure employed by the appellate court in other instances in which post-conviction applicants were granted relief from their invalid indeterminate sentences. Petitioner has no fundamental right to have the appellate court resentence her once her original sentences were vacated as invalid. Nor can Petitioner claim to be a member of a suspect class. See Lustgarden v. Gunter, 966 F.2d 552, 555 (10th Cir.) (Felons are not members of a suspect class), cert. Denied, 506 U.S. 1008 (1992). Oklahoma law grants the Oklahoma Court of Criminal Appeals the authority to affirm a sentence, modify a sentence, or reverse and remand to the trial court the issue of the appropriate sentence. Okla. Stat. tit. 22, Sec. 1066 (1991). "State legislatures are presumed to have acted with their constitutional power despite the fact that, in practice, their laws result in some inequality." McGowen v. Maryland, 366 U.S. 420, 425 (1961).

The appellate court's exercise of its discretion to adopt a procedure of remanding for resentencing those post-conviction proceedings in which sentences are vacated does not implicate the Equal Protection Clause, despite any prior procedural variance. The appellate court's determination that Petitioner was not denied equal protection by the remand of her post-conviction proceeding for resentencing is not contrary to Federal law, and Petitioner is not entitled to habeas relief regarding her claim of an equal protection violation related to her resentencing.

Petitioner's final claim for habeas relief concerns the admission of evidence at the resentencing proceeding.

Petitioner first claims that the prosecutor's failure to follow State law for providing notice to the defense of its intent to use evidence of other crimes violates her due process rights. Secondly, Petitioner contends that the admission of victim impact evidence violates her Eighth Amendment rights under Booth v. Maryland 482 U.S. 496 (1987), overruled by Payne v. Tennessee, 502 U.S. 808 (1991).

In addressing these allegations in Petitioner's post-conviction appeal, the Oklahoma Court of Criminal Appeals reviewed the issue only for fundamental error because Petitioner had failed to object to the admission of the pertinent evidence at the resentencing. The appellate court found "no fundamental error [occurred] in the admission of the now contested evidence" and concluded the issue was merciless. Stafford v. State, 800 P.2d at 740.

In Burks v. State, 594 P.2d 771 (Okla. Crim. App. 1979), the Oklahoma Court of Criminal Appeals imposed certain guidelines on trial courts, requiring, inter alia, that defendants be notified within ten days before trial of other offenses the prosecution intends to use at trial. However, this state-imposed requirement is not constitutionally required. The Supreme Court concluded in Weatherford v. Bursey, 429 U.S. 545 (1977), that "[t]here is no constitutional right to discovery in a criminal case, and Brady did not create one." Id. at 599. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court recognized a constitutional right to exculpatory evidence in a criminal trial, but beyond this limited right, "'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.'" Weatherford, 429 U.S. at 559 (quoting Wardius v. Oregon, 412 U.S. 470, 474 (1973)). The extent of discovery

allowed in criminal trials is generally a matter for each state to dictate. Herrera v. Collins, 506 U.S. 390, 407 (1993).

The Oklahoma appellate court's determination of the Burks issue is not contrary to Federal law. The only specific evidence of other crimes referred to in Petitioner's argument is her own statement to investigating officers made at the time of her arrest describing other crimes in which she and her co-defendant participated. Petitioner does not allege that she was unaware of the content of this statement or that she would have proceeded any differently in the resentencing had she received the Burks notice. The Supreme Court acknowledges that the admission of evidence of any "relevant unprivileged" information in a sentencing proceeding has long been the general rule at both the federal and state levels. Barefoot v. Estelle, 463 U.S. 890, 898 (1983). Hence, in this circuit, "the admission of evidence of unadjudicated offenses at a sentencing proceeding does not violate due process." Hatch v. State of Oklahoma, 58 F.3d 1447, 1465 (10th Cir. 1995), cert. Denied, 116 S.Ct. 1881 (1996).

In a related claim, Petitioner contends that the admission of victim impact statements at her resentencing violated her Eighth Amendment rights. In her post-conviction appeal, Petitioner relied on Booth v. Maryland, supra. In Booth, decided two years before petitioner was resentenced, the Supreme Court held unconstitutional a Maryland statute that required all presentence reports in felony cases to include a victim impact statement describing the effect of the crime on the victim and the victim's family. Id. at 498. However, the Supreme Court's decision in Booth was restricted to the use of

victim impact statements in a capital case. Id. at 504. The Court specifically noted that "[while the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstances of a capital sentencing hearing." Id.

Because Petitioner was not subject to the death penalty, Booth has no application to her resentencing. The Oklahoma Court of Criminal Appeals' finding of no fundamental error in the admission of victim impact evidence is not contrary to Federal law. Hence, Petitioner is not entitled to habeas relief as to her claims of constitutional deprivations in the admission of evidence at her resentencing.

Additionally, for the reasons set forth herein, Petitioner fails to make a substantial showing of the denial of a constitutional right. Accordingly, the 28 U.S.C. Sec. 2253 Certificate of Appealability required to appeal the denial of the 28 U.S. C. Sec. 2254 Petition for a Writ of Habeas Corpus should be denied.

RECOMMENDATION

In view of the foregoing reasons, the undersigned recommends that the 28 U.S.C. Sec. 2254 Petition for a Writ of Habeas Corpus be denied. It is also recommended that an appeal in forma pauperis and Certificate of Appealability be denied. The Petitioner is advised of her right to object to this Report and Recommendation on or before October 22 1997. Petitioner is further advised that failure to file a timely objection to this Report and Recommendation waives her right to appellate review of

both factual and legal issues contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate in the captioned matter.

Entered this 7th day of October, 1997.

GARY M. PURCELL
UNITED STATES MAGISTRATE
JUDGE

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CRF-80-1153
	)	CRF-80-1154
VERNA STAFFORD,	)	
	)	
Defendant.	)	

Post Conviction Findings
(Title 22, O.S. Supp. 1970, #1080 ET SEQ)

ORIGINAL CHARGE: Murder in the second degree. (Both cases).

JUDGMENT AND SENTENCE: 10 years to life, concurrent.

APPLICATION FOR POST CONVICTION RELIEF FILED: May 9, 1989

RESPONSE OF THE DISTRICT ATTORNEY: June 1, 1989

WAS FORM AUTHORIZED BY COURT OF CRIMINAL APPEALS USED: Yes

PROCEEDING IN COURT OF CRIMINAL APPEALS, IF ANY: None

IS THERE A GENUINE ISSUE OF MATERIAL FACT: None

IS AN EVIDENTIARY HEARING NECESSARY: No

IS THE TESTIMONY OF THE TRIAL JUDGE MATERIAL TO SUCH A HEARING? No

FINDINGS OF FACT: The court finds that defendant was sentenced under the provisions of 57 O.S. 353 which has since be found by the Court of Appeals to be inapplicable where a life sentence is the maximum.

CONCLUSIONS OF LAW: The applicant's request for relief should be granted and the cases must be set for hearing on disposition pursuant to 22 O.S. 1085.

ORDER: Sustained NOTICE: you may appeal this order by filing a petition in error in the Court of Criminal Appeals within thirty days from this date.

DATE: June 1, 1985.

(This order to be filed by the clerk as part of the minutes in this case.)

_____

Richard Freeman
District Judge

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)
	)
Plaintiff,	)
	)
vs.	) Case No.
	) CRF-80-1153
VERNA RAE STAFFORD,	) CRF-80-1154
	)
Defendant.	)

TRANSCRIPT OF PROCEEDINGS

HAD ON AUGUST 8, 1989,

BEFORE THE HONORABLE RICHARD M. FREEMAN

DISTRICT JUDGE

* * *

VOLUME II

REPORTED BY:
Theresa L. Reel, CSR, RPR-CP
805 COUNTY COURTHOUSE
OKLAHOMA CITY, OKLAHOMA 73102

one little 12 year old boy who only by the grace of God was alive at the time, and she took away his last chance.

Please, I ask you, don't turn her loose. Do everything you can to keep her in for the rest of her life.

THE COURT: Thank you, Mr. McCoy.

Well, I have reviewed the evidence that was admitted yesterday and glanced over the affidavit of Kay Huff again this morning.

You know, it's not our place here today to try to second guess Andy Coats or Judge Owens on things that they did many years ago. The law has been changed since tht time in respect to the rules that the Department of Corrections goes by in determining when someone is eligible for parole.

I suppose there is no end to the lessons that one might learn from this particular set of circumstances from Ms. Stafford's point of view. One thing, unfortunately that we learn, we all have to learn it sooner ro later, and maybe this is later for her, but you shouldn't ask for something, lest it might be granted to you. She's asked for a resentencing, and that's what she's here for.

In entering any sentence, there are reasons for sentencing defendants in cases. I go over these frequently with defendants. We have a civilization here and we have rules set up for our behavior. When someone violates our rules, some penalty has to be paid. And why do we sentence? Why do we use

I don't see anything you've done about your moral problems. And I don't want to countenance any particular religion here on behalf of the State of Oklahoma, but I would wager that there is one of the hottest corners of Hell, vacant, that has your name right above t and they are waiting for you. You need to do something about that.

And when you ask for something that you don't want or that you don't expect, it may come as a shock to you, but you've asked for a resentencing and I've got to do it. This is the awfulest crime I've ever heard of. I hope I never see another one, not for my sake but for the sake of those people that were involved, the perpetrators as well as the victims.

You know, I don't know what the Pardon and Paole Board will do in the future. It would be my fervent hope that you don't get out. I think you've forfeited your right to live in our society. You've done well since you've been in, and as Mr. McCoy says, that's probably the best place. I don't think you ought to be out.

Everyone knows, everyone in the business these days knows a life sentence is considered 45 years. You are considered for parole at 45 years on a life sentence. If I gave you a thousand years, you'd be considered for parole at 45, so it doesn't really matter. The length of time that I give you I don't think makes any difference.

I will give you the maximum that this particular

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

VERNA MONKS, a/k/a VERNA STAFFORD,	)	
Petitioner,	)	
v.	)	No. CIV-97-645-A
NEVILLE MASSIE, Warden,	)	
Respondent.	)	

ORDER

This matter is before the Court for review of the Report and Recommendation entered by United States Magistrate Judge Gary M. Purcell on October 7, 1997. Judge Purcell recommends denial of the petition for writ of habeas corpus because petitioner's claims for relief lack merit.

Petitioner, through counsel, has timely objected. Thus the Court must make a de novo determination of the portions of the report to which petitioner specifically objects. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). Having considered the objections, the Court finds the recommended disposition to be correct.

Petitioner pled guilty in 1980 to two counts of second degree murder and was sentenced by Oklahoma County District Judge Charles Owens to concurrent, indeterminate sentences of not less than ten years nor more than life imprisonment. In 1989, Oklahoma County

District Judge Richard Freeman granted an application for post-conviction relief on the ground that the indeterminate sentences were invalid and, following the presentation of evidence and argument, resentenced petitioner to two consecutive life sentences.

In her objection to the Report, petitioner challenges only Judge Purcell's findings that (1) no presumption of vindictiveness arose from her increased sentences and (2) no actual vindictiveness has been shown. Petitioner has waived further review of all other issues.

Upon de novo review of the file, the Court agrees with Judge Purcell's conclusion that the circumstances of petitioner's resentencing create no presumption of vindictiveness. Her harsher sentence was imposed by a different judge in a new sentencing proceeding and was accompanied by logical, nonvindictive reasons.

The Court also finds that petitioner has failed to show actual vindictiveness. She relies on certain remarks by Judge Freeman during the resentencing, particularly "you shouldn't ask for something, lest it might be granted to you . . . ." (TR 296.) This is a single statement, removed from its context. Reading the record as a whole, the Court concludes that by the complained-of remarks, the trial judge was not chastising petitioner for asking to be resentenced. Instead, the comments suggest empathy and perhaps, discomfort. After granting petitioner relief from her first sentence, Judge Freeman found himself in the awkward position of concluding that the circumstances of petitioner's crimes warranted punishment more severe than originally imposed. His remarks reflect the irony of the situation and not any vindictiveness on his part.

For these reasons, the Court adopts Judge Purcell's Report and Recommendation. The petition for writ of habeas corpus is DENIED, and judgment will be entered

accordingly. Also, a certificate of appealability is denied pursuant to 28 U.S.C. § 2253 (c)(2).

It is so ordered this 29th day of October, 1997.

WAYNE E. ALLEY
United States District Judge